



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 74 OF 2016

MAGGIE CALF LIMITED.....PLAINTIFF

- VERSUS -

FAMILY BANK LIMITED..... DEFENDANT

JUDGMENT

1. The plaintiff, **MAGGIE CALF LIMITED**, is a limited liability company and was at all the material time the registered owner of the property L.R.NO 37/242/11 on Ghadhi Avenue at Nairobi West. On that property there in a building known as Maggie Joe Court (hereinafter the premises).
2. The plaintiff's case in that **FAMILY BANK LIMITED** (hereinafter the bank) leased the premises for a term of 10 years commencing from 1st March 2014. The bank under that lease was to pay Monthly rent for the premises as follows:
 - a.) From 1st March 2014 to 28th February 2016 –Kshs. 400,000/=per month
 - b.) From 1st March 2016 to 28th February 2018 –Kshs. 460,000/=per month
 - c.) From 1st March 2018 to 28th February 2020 –Kshs. 529,000/=per month
 - d.) From 1st March 2020 to 28th February 2022 –Kshs. 608,350/=per month
 - e.) From 1st March 2022 to 28th February 2024 –Kshs. 699,603/=per month
3. The above rent was payable quarterly in advance. The Bank was also required to pay deposit of three months' rent.
4. The plaintiff pleaded that the agreement to lease signed by it and the Bank was dated 8th November 2013. It did not provide for early termination of the lease. Despite not having a termination clause, the Bank on or about 19th December 2014 gave the plaintiff a two months' notice to terminate its tenancy.
5. The plaintiff by this action seeks judgment against the Bank as follows:
 - a.) A declaratory judgment that the agreement to lease dated 8th November 2013 constitutes a valid contract for a lease that is legally binding and enforceable between the parties.
 - b.) A declaratory judgment that the Defendant's Notice of Terminate was issued contrary to the terms of the Agreement to lease and is therefore illegal and of no effect and the plaintiff was entitled to reject the same.
 - c.) A declaratory judgment that the Defendant is bound by the terms of the Agreement to Lease and should be condemned to pay the rent for the entire lease period for 10 years, less the rent already paid.
 - d.) Judgment for the sum of Kshs. 68,679,971.52/=

e.) Interest at commercial rates on the outstanding rent from due date till payment in full.

f.) A declaratory judgment that the defendant is bound to reimburse the Plaintiff, Kshs. 9,604,113/= being the expenditure incurred in conversion of the premises to banking hall specifications and thereafter the restoration of the premises to their original state thereof.

g.) A declaratory judgment that the Defendant is bound to refund Kshs. 400,000/= to the Plaintiff being the monies paid out to its former tenant in order to vacate the premises.

h.) Costs and interests of the suit.

i.) Any other just and equitable relief as this Honourable Court may deem appropriate.

6. The bank has through its defence denied the plaintiffs claim. The Bank's case is that there was no formal lease entered with the plaintiff. That rather there was a letter of offer to lease the premises further the bank denied that either its officers or architects directed the plaintiff to strip the premises of any doors, fixtures, electric fittings or water pipes. The Bank admitted it gave the Plaintiff two months' notice to terminate its tenancy and that such notice was valid and justifiable. Further that although it had possession of the premises it however never occupied the same and that the premises were handed back to the plaintiff on 28th February 2015 in the same condition it was let.

DISCUSSION

7. The plaintiffs claim is that on entering into the lease agreement with the Bank, the Bank required the plaintiff to terminate the existing tenancies of the premises in order to give the Bank vacant possession and further because the Bank intended to use the premises as a Banking Hall, that the Bank's officers, together with their architects, directed the plaintiff to strip the premises of all doors, fixtures, electricity fittings and water pipes. The following are the issues for determination:

a.) Did the agreement between the parties dated 8th November 2013 constitute a legally binding lease or contract?

b.) If (a) above is in the affirmative did the Bank breach that agreement?

c.) If (b) above is in the affirmative is the Bank liable to pay rent for the remaining period of ten years and to compensate the plaintiff for expenses incurred?

ISSUE (a)

8. The agreement dated 8th November 2013 (hereinafter the agreement) is in a form of a letter written by the plaintiffs' estate agent, Bageine Karanja Mbuu Ltd. to the Bank. I will reproduce that letter as follows:

“8th November 2013

Family Bank Ltd

Family Bank Towers

6th Floor, Muindi Mbingu Street

P. O. Box 74145-00200

NAIROBI

Dear Sirs,

RE: LEASE AGREEMENT – PREMISES ON PART L.R NUMBER 37/242/11 GANDHI AVENUE – MAGGIE JOE COURT – NAIROBI WEST

On behalf of the landlords we are pleased to make an offer of lease for the space outlined below on the following basic terms and conditions:

Lessor: Maggie Calf Ltd

P. O. Box 51334-00200

NAIROBI

Lessee: Family Bank Ltd

Family Bank Towers

6th Floor, Muindi Mbingu Street

P. O. Box 74145-00200

NAIROBI

Premises: The premises is that space situated on the ground and first floors of Maggie Joe Court LR No 37/242/11 Gandhi Avenue-Nairobi West Measuring approximately 3,780sq.ft

Term: Term of 10 years commencing 1st March 2014

Rent: The monthly rent payable and exclusive of any deductions will be as follows:

1. From 1st March, 2014 to 28th February 2016-Kshs 400,000/= per month
2. From 1st March 2016 to 28th February 2018 – Kshs 460,000/= per month
3. From 1st March, 2018 to 28th February, 2020 – Kshs 529,000/= per month
4. From 1st March 2020 to 28th February 2022 – Kshs 608,350/=
5. From 1st March 2022 to 28th February 2024 – Kshs 699,603/= per month.

Mode of payment: The rent payable thought the term shall be quarterly in advance and not later than 5th of every month.

Deposit: You will pay a deposit of three (3) months rent which will be held by the landlord and refundable on the expiry of the lease. The deposit will attract no interest. The deposit will be based on the current rent but will be topped up to the prevailing rent as per the Tenancy Agreement.

Partitions: Any partitions, fixtures or fittings done by the tenant will be removed by the tenant and the premises left in the same condition as found in the original state of the premises.

Goodwill: No goodwill has been paid by the tenant

Rates: The tenant will pay a fair portion of rates or any other lawful charges in respect to any legal and N.C.C rates and government land rent.

User: The premises will be used exclusively for banking purposes only.

Kindly sign and return the two copies of this letter thereby confirming your acceptance of the above terms and conditions.

Kindly also make your payment of Ksh 2,407,500/= broken down as follows:

- | | |
|---|-----------------|
| a. Three (3) months rent security deposit | |
| (based on the current rent) | Ksh 1,200,000/= |
| b. months rent | |
| (March, April and May 2014) | Ksh 1,200,000/= |
| c. Water deposit | Ksh 2,500/= |
| d. Electricity deposit | Ksh 5,000/= |
| | Ksh 2,407,500/= |

Yours faithfully

For and on behalf of

BAGEINE KARANJA MBUU LIMITED

Mr STEPHEN M. KARANJA

BA LAND ECONOMICS (HONS NRB M.I.S.K (VS)

REGISTERED AND PRACTISING VALUER

Encls

TENANT: We FAMILY BANK LIMITED OF P. O. BOX 74145-00200 NAIROBI AGREE TO THE ABOVE TERMS AND CONDITIONS

SIGNATURE.....

DATE.....20/11/13

LANDLORD: WE AGREE TO LEASE THE ABOVE SPACE TO THE TENANT ON THE ABOVE TERMS AND CONDITIONS

SIGNATURE

DATE.....21/11/13

9. It is submitted on behalf of the plaintiff that the agreement is a valid contract. The plaintiffs learned counsel submitted thus in respect to that agreement:

“...It is the plaintiffs humble submission that whichever term was used at the time, neither of the parties was under any misapprehension as to the fact that there was in existence a landlord-Tenant relationship, hallowed by a formal written instrument...,one which, in the contemplation of at least one of those two parties, was to run for 10years uninterrupted.”

10. The plaintiff further signed that even in the absence of a signed and registered lease the agreement hereby does operate as a valid contract.

11. The plaintiff cited the case of **SOUZA FIGNERIREDO-V-MOORING HOTEL CO. LTD (1960) E.A.926**. That case however construed the provisions of section 51 of the Uganda Registration of Titles Ordinance which is not the applicable law in this case. The court in that case found that these was nothing in that ordinance which rendered an unregistered instrument ineffectual as contract between the parties.

12. The court of appeal in the case **CHON JEUK SUK KIN & ANOTHER N E.J. AUSTIN & 2 OTHERS (2013) eKLR** while considering an agreement for a lease, where the lease had not been executed, faulted the high court (the trial court) as follows:

“However, the learned Judge erred in law applying herein equity of Walsh v Lonsdale (supra) and in treating an agreement for a lease is as good as a lease. As the President said in Souza Gigueiredo (supra) an unregistered to lease where there is statutory requirement for registration is not capable of conferring legal or equitable estate in the land – see also Said Ben Sultan Bin Mohamed v Jokha Binti Sultan Bin Sahim EL Muisking (1955) I EACA 273) In Rogan-Kamper v Lord Grosvenor (No. 2) (1976-80) I KLR 558, the the court declined to apply the equitable principle holding in essence that the operation of equitable principle was excluded by the statutory requirement for registration. However, it is worth repeating that covenants and stipulations in such document are enforceable inter parties.”

13. The court of appeal in that case CHO JEUK(supra) further stated that the contract has to be construed in relation to the pleading and evidence under the principle of law of contract to find out whether it was enforceable.

14. The plaintiff relies on the provision of section 36(1) and (2) of the Land Registration Act No. 3 of 2012, which is in the following terms:

36. Dispositions and dealings affecting land

(1) A lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not, extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract.

36. Dispositions and dealings affecting land

(1) A lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to

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(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract.

15. Section 2 of the Land Act 2012 defines Lease as:

“lease” means the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease **but does not include an agreement for lease;**” (emphasis mine)

16. Conversely Section 2 of the Land Registration Act defines Lease as:

“lease” means—

(a) a lease or sublease, whether registered or unregistered of land; or

(b) a short-term lease or agreement to lease;”

17. It will be noted that the Land Registration Act categorizes an agreement to lease, such as the agreement in this case, as a lease. I also find bearing in mind the evidence before me that the agreement between the plaintiff and the Bank was a valid and enforceable agreement. It ought to be noted that there was no registered instrument between the parties nevertheless the agreement is in my view enforceable as a contract between the parties. The agreement is headed “Lease Agreement”. The terms of the lease are very clear. Those terms were accepted by the Bank when it signed “we, family Bank Limited.... Agree to the above terms and conditions.” Amongst the terms the Bank agreed to was that it would lease the premises for 10 years. The agreement did not provide for termination. It follows that the bank is liable to pay the plaintiff rent for the period of the remaining term of the lease.

18. It follows therefore that the finding of the court in respect to the first issue is that the agreement dated 8th November 2013 constitutes a legally binding contract whose terms is enforceable interpartes.

ISSUE (b)

19. Under this issue I will in a view of the affirmative finding of issue (a), determine whether the Bank breached that agreement.

20. Having found that one of the terms of the agreement between the parties is that the Bank was to lease the premises for ten years, and the Bank having terminated that tenancy within one year, it follows that the bank breached the term of the agreement which provided that the term of tenancy was ten years.

ISSUE (c)

21. Having found that the Bank breached the agreement by terminating the tenancy within one year the Bank is liable to pay rent for the remaining period of the tenancy.

22. The plaintiffs claim for compensation of Kshs 9,604,113 being the amount the plaintiff expended to repair the premises must fail. It fails because it is one of the terms of the agreement that the Bank would surrender the premises, at the end of the term of the tenancy, in the same condition it was in when the tenancy commenced. The evidence before court is that the plaintiff removed some fixtures and fittings to enable the Bank convert the premises into a banking hall.

23. The Bank on giving back the premises, when it terminated the tenancy, returned those premises in the same condition they were let. The evidence before court is that the Bank, although paid one year’s rental, did not take actual possession of the premises. The Bank did not move into the premises. It follows that the premises were not altered from their state when they were let to the Bank. On that ground the plaintiffs claim for compensation for renovation failed.

24. That claim will also fail because the plaintiff did not provide any professional quote for the renovation nor a quantity surveyors’ estimate of its cost. It also needs noting that the receipts, petty cash vouchers and delivery notes are not supportive of the plaintiffs claim. They lack sufficient detail to support the claim for special damages.

25. The plaintiff’s claim for refund of ksh 400,000 paid to a previous tenant to persuade the tenant vacate the premises fails because it was not a term of agreement between the parties.

26. The plaintiff has on the whole succeeded in its claim and is therefore entitled to the costs of this suit.

CONCLUSION

27. In the end the judgment of this court is as follows:

(a) A declaration is hereby made that the Agreement to lease dated 8th November 2013 constitutes a valid contract for lease that is legally binding and enforceable between the parties.

(b) A declaration is made that the defendant breached that agreement in terminating the tenancy before expiry of its term.

(c) Judgment for the unexpired rental term is hereby entered for the plaintiff against the defendant for ksh 68,679,971.52 plus interest at court rate from the date of this Judgment until payment in full.

(d) The plaintiff is awarded costs of this suit.

DATED, SIGNED and DELIVERED at **NAIROBI** this 13th day of **OCTOBER** 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendant:

ORDER

This decision is hereby virtually delivered this 13th day of **October, 2020**.

MARY KASANGO

JUDGE